Weinberg
Roger &
Rosenfeld
A Professional Corporation

1001 Marina Village Parkway, Suite 200
Alameda, California 94501
TELEPHONE: (510) 337-1001
FACSIMILE: (510) 337-1023
David A. Rosenfeld
drosenfeld@unioncounsel.net

April 22, 2020

VIA ELECTRONIC FILING

Peter B. Robb
General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, D.C., 20570-0001

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Beth Tursell, Associate General Counsel
Division of Operations
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

David P. Berry, Inspector General
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: MHN Govt. Services, LLC (MHNGS) - Joint Base Lewis McChord
Int'l Association of Machinists & Aerospace Workers, Local Lodge 47
NLRB Case No. 19-RC-242915 (Transferred to Region 32)
Complaint of Attorney Misconduct and Opposition to Request for Stay

Dear General Counsel Peter Robb, Executive Secretary Rothschild, Associate General Counsel Tursell, and Inspector General Berry:

We represent the International Association of Machinists and Aerospace Workers, Local Lodge 47 ("Union") in the above entitled case. We are in receipt of the correspondence of Peter D. Conrad ("Conrad"), counsel for MHN Government Services, LLC ("MHNGS"), dated April 17, 2020 in which he flagrantly, baldly, and in bad faith for the improper purpose of delaying the proceedings, accuses a Board Agent of lying under oath. Because this allegation was frivolous, made without a basis in fact and without reasonable cause, and misrepresents the record, Conrad has engaged in misconduct. We respectfully request that the NLRB deny MHNGS's request for stay, and make a Section 102.177(e) referral followed by a prohibition of practice of Conrad for a substantial period of time. We also ask that his misconduct be referred to the appropriate state bar for discipline.

Background

On or about December 13, 2019, six days before the hearing on objections, Conrad requested the testimony of Board Agent Patrick Berzai ("Board Agent") and documents related to the Board Agent's alleged misconduct during the election. On December 13, 2019, Regional Director Valerie Hardy-Mahoney responded stating in part, "there are no such responsive documents *in the Regional office files*." (Ex. B to Respondent's Request

for Review – emphasis added). It is evident that the initial inquiry and search into these records was limited to the "Regional office files." *Id.* It was not until the evening before the hearing that the Region 32 attorney discovered the notes later marked as Regional Director's Representative Exhibit 1 ("R-1").

On December 19, 2019, a Region 32 hearing officer conducted the hearing on objections. The notes were produced at the hearing and both counsel for the Respondent and Union were provided a copy. The Board Agent testified that he created the notes about a day or two after learning of the Employer's objections, which were filed on July 3, 2019. Berzai kept the notes at his residence and did not provide them to anyone until about December 17, 2019 (Tr. 52-53, 59).

On or about December 23, 2019, the transcript became available to the parties. On January 3, 2020, MHNGS, through Conrad, filed its post-hearing brief, replete with citations to the transcript. Then, on February 18, 2020, Conrad served MHNGS's brief in support of their Exceptions to the Report and Recommendations. On April 6, 2020, Conrad served MHNGS's Request for Review. On Monday, April 13, 2020, the Union filed its Opposition to the MHNGS's Request for Review. On the same day MHNGS represents that it contacted the Inspector General to express its concerns about "the Board agent's testimony and other conduct in this matter." (Letter to Exec. Sec. at 1). According to the letter, a written complaint was filed on April 15—nearly four months after the December 19 hearing.

In the Letter to the Executive Secretary, Conrad argues that "there is more than ample basis in the record to conclude that the agent's 'notes' were most likely prepared at a much later point in time, well after he learned of the objections, i.e., following the Board's December 3 Order granting our initial Request for Review in this case . . . ." (at 2).

In the Letter, Conrad does not specify what evidence there is to conclude that Exhibit R-1 was—in fact—created after December 3. But Page 1 of the Letter refers to page 22 of the Request for Review. Page 22 of the Request for Review states, in relevant part, "The entirety of Berzai's testimony . . . was based on those notes, and there is every good reason to believe, as discussed below, that they were written at a much later date, i.e, after the Board had granted the . . . first Request for Review . . .. If so, the Board would have no alternative but to strike Berzai's testimony . . . and refer the matter to its [IG] . . . ."

The Request for Review later argues that, even though "the Board agent's testimony may have been generally consistent with R-1 . . . . there is ample reason on this record, based on the Board agent's highly irregular conduct following the election, to conclude that Berzai misrepresented the date that he recorded his recollections of the June 28 election." (at 24). The "irregular conduct" that Conrad relies on as the basis of this allegation that the Board agent perjured himself is the "very suspect circumstances surrounding the creation and concealment [of the notes . . . ." This, according to Conrad, includes that the Board Agent created the notes on his own (at 11 of Req. for Rev.), this was the first time the Board Agent made a written record of any election that he supervised (*Id.*), the notes were not shown or disclosed to anyone at the Regional Office (*Id.*), the notes were not placed in the case file and instead were maintained in the Board Agent's residence (*Id.* at 11 and 24), and that the notes were not disclosed to anyone until approximately two days before the hearing (*Id.*).

The Facts Conrad Relies Upon to Accuse the Board Agent of Perjury are Unremarkable and Show that Conrad Has Violated Rules of Professional Conduct for the State of Washington and New York

"Any attorney . . . practicing before the Agency must conform to the standards of ethical and professional conduct required of practitioners before the courts . . . ." 29 CFR § 102.177(a). "Misconduct by an attorney . . . at any stage of any Agency proceeding . . . may be grounds for discipline." *Id.* § (d). Both the Rules of Professional Conduct for the State of Washington[1] and the Rules of Professional Conduct for the State of New York[2] impose a duty of candor toward tribunals.[3] Both the Washington and New York rule prohibits attorneys from making "a false statement of fact or law to a tribunal . . . ." Comment 3 to both state's Rules state "an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." Furthermore, when an attorney makes frivolous arguments or misrepresents the record, the conduct runs afoul of section 102.177. *Roemer Indus*., 367 NLRB No. 133, n. 2 (2019).

Here, Conrad has made the very serious—yet baseless—allegation in a written document requesting a stay of the present petition that the Board Agent committed perjury by lying about when he created Exhibit R-1.[4] There is no basis in the record to suggest that the Board Agent lied about when he created the notes. Conrad's supposed basis for accusing the Board Agent of perjury is the fact that the Board Agent created the notes on his own (at 11 of Req. for Rev.), that this was the first time the Board Agent took notes of any election that he supervised (*Id.*), the notes were not shown or disclosed to anyone at the Regional Office (*Id.*), the notes were not placed in the case file and instead were maintained in the Board Agent's residence (*Id.* at 11 and 24), and that the notes were not disclosed to anyone until approximately two days before the hearing (*Id.*). Even evaluated in a light favorable to Conrad, nothing here raises any inference that the notes were created in December 2019, instead of when the Board Agent said that he created them in July 2019. The following shows why each fact relied on by Conrad raises no inference that the Board Agent lied about when he created Exhibit R-1 and that, therefore, he has made a frivolous and baseless accusation.

First, the fact that this was the first time that the Board Agent took notes about an election and that he took it upon himself to create these notes is unremarkable. There is a first time for many things. And since this was the first election where the Board Agent's conduct was called into question, it is not surprising that shortly after learning about the objections, he decided to make notes to maintain his then best recollection of the events in question. There is nothing remarkable about taking it upon oneself to document events when one's recollection is clear. These facts do not lead to any inference that the Board Agent actually took the notes in December 2019.

---

[1] This petitioned-for-unit is located in Tacoma, Washington.

[2] Peter D. Conrad's office is located in New York.

[3] Washington Rules of Professional Conduct, Rule 3.3; New York Rules of Professional Conduct, Rule 3.3.

[4] Conrad carefully words the allegation in the Letter to the Executive Secretary when he states that the Board Agent "may have perjured himself as to material issues in the case." (at 1). That wording does not conceal that he is accusing Berzai of perjury.

Second, it is also unremarkable that he did not disclose the notes to anyone in the Regional Office until two days before the hearing. Under 29 CFR § 102.69(c)(1)(i), regarding the process for resolving objections to an election, if "the regional director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing . . . the regional director shall issue a decision disposing of the objections. . ." Similarly, under the Casehandling Manual for Representation Cases, section 11394.1, "regional directors should not conduct investigations where affidavits are taken before deciding whether to set objections for hearing. Instead, upon receipt of the offer of proof, the regional director should simply evaluate each objection and the accompanying offer of proof to determine whether the evidence described in the offer of proof could be grounds for setting aside the . . . ." Here, Region 19 originally concluded that the objections and offer of proof failed to state facts sufficient to set aside the election. As such, it would not be expected that the Region would interview the Board Agent about the election—a fact that Respondent implicitly acknowledges by making no issue of the fact that the Region initially found no "statements, investigative notes and reports in the possession of the Regional Office, which relate to or shed light on the misconduct that is the subject of the Employer's election objections . . . ." (Appendix B to Req. for Rev.). Therefore, it is not surprising that the Board Agent's notes were not disclosed until days before the hearing in December, as he was not contacted by the Region about what happened. He did not keep the document "secret" or fail to disclose them to the Region. Instead, once the hearing was approaching and he was asked about any responsive documents, he promptly provided them to the Region.

There is also nothing about the fact that the Board Agent maintained the notes in his home, instead of placing them in the case file that would lead to an inference that he created the notes in December, instead of in July. If the Board Agent was so concerned about surreptitiously creating notes in December and planning to lie that they had been created in July 2019, then why did he not write a date on the document to make the document more convincing? And out of everything that the Board Agent could have lied about, why would he lie about when he created the document? There was nothing that required the Board Agent to create the notes in the first place. He was not expected to create those notes and the Board Agent testified that he had never created notes about an election before. So it wouldn't have mattered if he had created them in December as opposed to June—other than to give the appearance that they were created back when his memory was clearer. But that would have been unnecessary as all of the witnesses in the hearing were going to be testifying about events from the June election. It would make no sense for the Board Agent to lie under oath about when he created the notes and put his career on the line. And the fact that he kept the notes at his home and never brought them into the office does not lead to an inference that he created the notes in December instead of July.

Lastly, the consistency of Exhibit R-1 with the other evidence in the hearing, including the testimony of Respondent's own witness, further supports why Conrad's accusation is baseless and frivolous. Not only does Conrad acknowledge that the Board Agent's testimony was "generally consistent with [Exhibit] R-1," he also acknowledges that the Board Agent's testimony about the incident at the election "largely parallels" that of Respondent's Observer (*Id.* at 14). There were no inconsistent statements about when he created the document. There is nothing that could lead anyone to think that the Board Agent lied about when he created the notes. That is why it is not until nearly four months after the hearing, that Conrad now makes this accusation against the Board Agent for the first time.

Conrad would have the NLRB believe that the Board Agent learned about the objections in July and did nothing. Then, after the NLRB issued its order in December remanding the case for a hearing, the Board Agent took it upon himself to create notes about what happened at the June 28 election. The notes—as it turns out—just so happen to recount the events in a manner that largely parallel Respondent's observer's testimony and the other evidence presented at the hearing. And then while testifying, the Board agent committed perjury and risked his career by lying about when he created the notes. It makes no sense, is not based on evidence in the record, and was done purely to further delay the processing of this petition. While Conrad cannot be happy that his litigation strategy—comprised of requesting that the Board Agent testify and seeking all notes and other documents regarding the election—backfired,[5] he should not be permitted to make baseless, frivolous, and meritless allegations about the Board Agent all so that this representation case can be delayed longer than it already has. Now that MHNGS has submitted its Request for Review and the Union has opposed it, Conrad seeks further delay of this petition by belligerently accusing the Board Agent of perjury without any basis to do so.

Since Conrad's Allegations are Baseless, Frivolous, and in Bad Faith, the Request for Stay Should be Denied

Conrad requests that the NLRB stay this representation case until the OIG has considered MHNGS's complaint. Section 102.67(j)(1)(ii) allows one to make a request for extraordinary relief, such as a stay of proceedings. But such request may only be granted "upon a clear showing that it is necessary under the particular circumstances of the case." MHNGS's showing, supported by Conrad's baseless and frivolous allegation that the Board Agent committed perjury, falls far short of a clear showing of necessity. Since there is no reasonable basis to believe that the Board Agent perjured himself about when he created his notes, extraordinary relief is not warranted. Further this misconduct should be referred to the General Conduct pursuant to Section 102.177 to impose discipline on Mr. Conrad. He deserves nothing less than a sanction of prohibition against practicing before the Board for a substantial period of time and referral of his misconduct to the appropriate bar association for further disciplinary action.

Sincerely,

David A. Rosenfeld

DAR:lbh
opeiu 29 afl-cio(1)

cc: Ms. Valerie Hardy-Mahoney
Mr. Richard Fiol, Esq.
Mr. Peter D. Conrad, Counsel for Employer
International Association of Machinists and Aerospace Workers, Local Lodge 47

147993\1079623

[5] Absent the Board Agent's testimony, the only testimony of the interaction would have been that of MHNGS's observer, as the Union's observer did not recall much about the interaction.